Supreme Court, U.S.
FILED
OCT 30 1995
CLERK

(2)

No. 95-195

In the Supreme Court of the United States

OCTOBER TERM, 1995

L.B. WINDHAM, ET AL., PETITIONERS

v.

FIRST GIBRALTAR BANK, F.S.B.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the court of appeals correctly decided, under Oklahoma law, that a mortgage creates a lien upon the rents and profits collected from mortgaged property, for purposes of determining whether a mortgage holder's lien on rents and profits has been perfected in accordance with 11 U.S.C. 546(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-6a) is unpublished, but the decision is noted at 53 F.3d 342 (Table). The opinions of the district court (Pet. App. 7a-15a) and the bankruptcy court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1995. A petition for rehearing was denied on June 6, 1995. Pet. App. 2a-3a. The petition for a writ of certiorari was filed on August 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are limited partners and the general partner of OKC Partners, Ltd., a Texas limited partnership (the Partnership). Pet. 3. In 1985, the Partnership mortgaged two shopping centers to First Texas Savings & Loan Association. *Ibid.*; Pet. App. 8a.[1]

2. On March 30, 1988, First Texas commenced an action in an Oklahoma state court to foreclose on its mortgages and to collect the recourse portion of its debt. Shortly after the action was commenced, First Texas filed an application for the appointment of a receiver. Pet. 5; Pet. App. 8a. On May 24, 1988, the Partnership filed for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Oklahoma. Pet. 5.

3. On June 6, 1988, First Texas filed a motion with the bankruptcy court objecting to the debtor's use of rents from the shopping centers and seeking to modify the automatic stay. While the motion was pending before the bankruptcy court, First Texas was declared insolvent, and the notes and mortgages that are the subject of this litigation were acquired by First Gibraltar Bank (Gibraltar), F.S.B.[2] Pet. App. 9a; Pet. 5.

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[1] One of the shopping centers, Town & Country Village Shopping Center, was subject to a prior mortgage lien in favor of American Reinsurance Company. Pet. App. 7a-8a. American Reinsurance was a party in this case in the court of appeals.

[2] On June 16, 1995, following the court of appeals' decision and issuance of the mandate, the Federal Deposit Insurance Corporation as Manager of the FSLIC Resolution Fund entered into an agreement with First Nationwide Bank, A

4. On October 21, 1992, after reconsidering and vacating its prior orders, the bankruptcy court entered an order holding that, under Oklahoma law, the mortgages created a lien upon the rents and profits from the shopping centers. The bankruptcy court further held that Gibraltar's lien had been perfected by the filing of First Texas' motion objecting to the debtors' use of rents from the shopping centers, which constituted a notice under Section 546(b) of the Bankruptcy Code, 11 U.S.C. 546(b).[3] Pet. App. 11a.

Federal Savings Bank, the successor to First Gibraltar Bank, F.S.B. Under that agreement, the notes and mortgages subject to this litigation were transferred to the FDIC, effective June 1, 1995. We have filed a motion in this Court requesting the substitution of the FDIC for Gibraltar as the respondent in this case. To avoid confusion, Gibraltar is referred to herein as the respondent.

[3] Section 546(b), at all times relevant hereto, stated:

> The rights and powers of a trustee under section[s] 544, 545, and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

11 U.S.C. 546(b) (Supp. III 1979). Under Section 546(b), a mortgage lien holder is permitted to perfect its lien in rents following the filing of a bankruptcy petition if, under applicable state law, perfection could relate back to defeat the rights of an intervening creditor. In addition, if applicable state law requires seizure or the commencement of a legal

5. On appeal, the district court affirmed the bankruptcy court. Pet. App. 15a.[4] The district court held that the outcome of the case was controlled by the Tenth Circuit's decision in *Virginia Beach Fed. Sav. & Loan Ass'n* v. *Wood*, 901 F.2d 849 (10th Cir. 1990). In the district court's view, the Tenth Circuit's decision in that case, which arose in a similar context and also involved the application of Oklahoma law, was "consistent with Oklahoma law" and had "not been brought into question" by a subsequent Oklahoma decision, *Teachers Ins. & Annuity Ass'n* v. *Oklahoma Tower Associates Ltd. Partnership*, 798 P.2d 618 (Okla. 1990). Pet. App. 12a.

6. The court of appeals affirmed in an unpublished order. Pet. App. 4a-6a. The court of appeals stated that its decision in *Virginia Beach* was controlling, and it affirmed "substantially for the reasons stated in the district court opinion." Pet. App. 6a.

ARGUMENT

Petitioners claim that the courts below did not apply Oklahoma law to determine whether Gibraltar's mortgage liens extended to rents and profits from the

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action to accomplish perfection, a motion filed in accordance with Section 546(b) will be sufficient to perfect the lien. 4 *Collier on Bankruptcy* ¶ 546.03 (L. King ed., 15th ed. 1995).

In 1994, Section 546(b) was amended to make clear that it was applicable to acts to continue or maintain perfection in property. The amendment is effective in bankruptcy cases filed on or after October 22, 1994. *Collier on Bankruptcy, supra*, ¶ 546.03, n.a.; Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 204, 702, 108 Stat. 4122, 4150.

[4] The district court reversed the bankruptcy court on the limited issue of the timing of the distribution of the rents to Gibraltar. Pet. App. 15a. The instant petition does not raise any issue regarding that holding.

shopping centers and that, insofar as they did apply Oklahoma law, they did so incorrectly. The alleged conflict with state law would not provide a sufficient basis upon which to grant certiorari and, in any event, no such conflict exists.

1. Petitioners claim (Pet. 6-10) that the courts below did not apply Oklahoma law in determining whether Gibraltar's mortgage liens extended to rents and profits from the shopping centers. To the contrary, the Tenth Circuit in *Virginia Beach* expressly applied state law in a similar context, the district court in this case re-examined and reaffirmed the *Virginia Beach* result in light of a later state law precedent, and the court of appeals in this case again re-examined the issue and again reached the same conclusion.

a. Relying upon this Court's decision in *Butner* v. *United States*, 440 U.S. 48, 55-57 (1979),[5] the Tenth Circuit in *Virginia Beach* made quite clear that it "look[s] to state law to determine whether [the mortgagee] had the requisite security interest in the subject rental income," 901 F.2d at 851; Pet. App. 19a, and that "[s]tate law controls the issue of whether a property interest has been perfected." 901 F.2d at

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[5] At issue in *Butner* was whether state or federal law should determine if rents collected by a bankruptcy trustee between the filing of a bankruptcy petition and the foreclosure sale of the property should be applied against the outstanding indebtedness of the second mortgage. This Court ruled that state law governs:

> [T]he federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued.

440 U.S. at 56.

852; Pet. App. 21a. After reviewing Oklahoma statutory and case law, the court held that a mortgagee may obtain such a security interest under Oklahoma law and that it is perfected when the mortgagee either seizes the property or obtains the appointment of a receiver. 901 F.2d at 851-852; Pet. App. 20a-21a. Based on that premise, the court held that a mortgage holder perfects its lien on rent by filing a notice under Section 546(b). 901 F.2d at 852; Pet. App. 22a-23a. The court of appeals concluded by stating:

> [T]his result comports with the direction in *Butner* that state law should be applied in determining the exact extent of a mortgagee's interest in rental income.

901 F.2d at 853; Pet. App. 25a. The decision in *Virginia Beach* was thus expressly based upon state law.

b. In this case, the district court carefully considered petitioners' claim that the *Virginia Beach* decision had misread Oklahoma law. The court reviewed the decision in *Virginia Beach* and considered whether an intervening state law precedent cited by petitioners cast any light on the continuing validity of the *Virginia Beach* holding. Pet. App. 12a-13a. The district court noted that the Oklahoma Supreme Court "specifically [did] not reject *Virginia Beach*" in the later case, but instead distinguished it on the ground that it involved a mortgage that, like the mortgage at issue in this case, was entered into under a prior statute. Pet. App. 13a. The court concluded that *Virginia Beach* "is controlling in this matter," that it "is consistent with Oklahoma law," and that it "has not been brought into question" by the later Oklahoma decision. Pet. App. 12a.

c. The court of appeals affirmed the district court's holding for the reasons given in the district court's opinion. The fact that the court of appeals found it unnecessary to restate the district court's sound reasoning in its own words does not suggest any error concerning the applicable source of law; the court had made quite clear in *Virginia Beach* its understanding that state law controlled. And although petitioners appear to contend (Pet. 10-11) that the court of appeals' failure to write an opinion suggests that it did not review the district court's conclusions concerning state law under the appropriate *de novo* standard, see *Salve Regina College* v. *Russell*, 499 U.S. 225, 231 (1991), the only support for that conclusion is petitioners' own unsupported speculation.

2. Petitioners also seek (Pet. 11-12) to impose a requirement that a court of appeals include language in any opinion to the effect that the court has either examined applicable state law and determined that the applicable state law is settled, or that the court is certifying the question to the State's highest court because of uncertainty in the state law. Any such requirement would be unwarranted. Under well-settled jurisprudence, the court of appeals had broad discretion to determine that certification to the Oklahoma Supreme Court was unnecessary. See *Lehman Bros.* v. *Schein*, 416 U.S. 386, 389-391 (1974); *id.* at 392-395 (Rehnquist, J., concurring). The court of appeals' affirmance reflects a decision that certification was unnecessary.[6]

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[6] The district court denied a motion filed by the Partnership requesting certification to the Supreme Court of Oklahoma of state law questions. In denying the motion, the

3. Petitioners' various claims reduce to the contention that the courts below misapplied state law in this case. Even if petitioners were correct in this contention, a misapplication of state law would provide no basis for further review in this Court. See *Sheridan* v. *United States*, 487 U.S. 392, 401-402 (1988); *Butner*, 440 U.S. at 57-58; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

In any event, the court of appeals correctly applied state law. As the court held in *Virginia Beach*, a mortgage constitutes a lien upon rental income under Oklahoma law. 901 F.2d at 851; Pet. App. 20a. Such a lien can be perfected by foreclosure or by the judicial appointment of a receiver. *Little* v. *Keaton*, 38 F.2d 457, 461 (10th Cir.), cert. denied, 282 U.S. 847 (1930) ("The statute recognizes the mortgage as creating an equitable lien on the rents pending foreclosure."); *Hart* v. *Bingman*, 43 P.2d 447 (Okla. 1935); Okla. Stat. tit. 12, § 1551 (1993).

The sole authorities cited by petitioners in support of their argument to the contrary (Pet. 13), Okla. Stat. tit. 42, §§ 10, 11 (1990),[7] are irrelevant here.

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district court stated: "There is sufficient authority to guide the court in resolving the legal issues presented." District Court Docket No. 11, Order of January 25, 1993.

[7] Title 42 Okla. Stat. §§ 10 and 11 provide:

§ 10. Lien transfers no title.

Notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien.

§ 11. Contracts for forfeiture of property and restraining redemption.

All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and

Neither provision addresses the creation or perfection of a mortgage holder's lien upon rental income. Under Oklahoma law, the lien interest arises from the mortgage itself, without regard to whether there is an assignment of rents created either by separate instruments or by specific provisions contained in the mortgage document. For that reason, petitioners' references to Oklahoma law regarding the enforceability of an assignment of rents (Pet. 3) have no bearing on the issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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all contracts in restraint of the right of redemption from a lien, are void, except in the case specified in Section 1122.

Okla. Stat. tit. 42 §§ 10, 11 (1990).